

Another bad deal for Canada

TILMA, deep integration and the fight for local democracy

September 2007

In April 2006, without public consultation or legislative debate, the premiers of Alberta and British Columbia signed the Trade, Investment and Labour Mobility Agreement (TILMA), an unprecedented inter-provincial free-trade pact that will have devastating effects on local democracy and facilitate Canada's deep integration with the United States. TILMA is a corporate bill of rights for western Canada and it must be stopped before it spreads across the country.

The Council of Canadians and other grassroots organizations fighting TILMA have successfully discredited the agreement as a heavy-handed and under-handed solution to a relatively benign "problem" – so-called inter-provincial trade barriers. Unfortunately, local, provincial and federal politicians across the country continue to be swayed by a powerful big business lobby intent on removing all laws and regulations that get in the way of higher profits – even if those laws are designed to protect our health, environment and the local character of our communities.

What is TILMA?

TILMA is a legal document that gives special rights to individuals and corporations to sue provincial governments and their official agencies over any rules, regulations or other government measures that they feel "restrict or impair" their trade or investment (i.e. profits). Under TILMA, even provincial or municipal policies designed to protect the environment and public health from corporate abuse are vulnerable to attack from such lawsuits.

When TILMA came into effect on April 1, 2007, it established a legally binding process for parties to the agreement—the provinces, as well as private individuals and corporations—to challenge:

- Government programs and regulations if they "restrict or impair" investment (Article 3)
- Regulations in one province that are different from those in another (Article 5.1)
- The establishment of new, stricter regulations (Article 5.3)
- Initiatives by one province that the other does not agree with (Article 7.2)

All disagreements over whether a government measure constitutes a restriction on profits will be arbitrated by independent NAFTA-style panels with the power to penalize governments with fines as high as \$5 million. Unlike the Agreement on Internal Trade (AIT), there is no screening process in TILMA for frivolous complaints, and governments can be hit with repeated complaints against the same program or regulation.

Gary Mar, the cabinet minister responsible for negotiating TILMA for Alberta, said that this dispute resolution process is "everything Canadian business asked for," and that TILMA "is backed by some very big teeth." Not surprisingly, Canada's biggest business organizations like the Chamber of Commerce and Canadian Council of Chief Executives have formally asked premiers to take TILMA national by adopting its dispute resolution process into the AIT. The premiers agreed to consider this at a 2007 Council of the Federation meeting in New Brunswick.

Unfortunately, the arguments these business groups are peddling are based entirely on a thoroughly discredited Conference Board of Canada survey that claims that TILMA will save B.C. \$5-billion a year and create almost 80,000 jobs.

According to a report from economists Marc Lee and Erin Weir, the projected benefits from TILMA are "implausibly large" and based on a tiny survey of B.C. businesses—only four of the 13 polled returned surveys—and government ministries.

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“The scoring of estimated benefits is completely arbitrary,” the economists write. “No literature, data, interviews with companies, or lists of alleged barriers are presented.”

After adding up these arbitrary figures, the Conference Board then accidentally doubled its final estimate of TILMA's benefits. “Even after correcting this error,” write Lee and Weir, “most of the projected benefits are from industries exempt from the agreement or from industries that barely engage in inter-provincial trade.”

This assessment agrees with a 1998 study done for the B.C. government which claimed that “efforts to liberalize inter-provincial trade will have almost no effect on trade flows,” and that “the reality is that inter-provincial trade barriers are already very low.”

The provincial government in Saskatchewan, which recently wrapped up a public consultation on inter-provincial trade that focused on TILMA, has refused to sign on to the agreement precisely because it wasn't convinced by the weak arguments from supporters of the deal. Saskatchewan's Government Relations Minister Harry Van Mulligen also said TILMA's “shock therapy” approach to trade barriers was unhelpful and that the province couldn't afford to be sued every time a corporation felt some rule or another was hurting profits.

TILMA and deep integration

Policy harmonization and investor rights are the goals of all free trade agreements. They were a main component of NAFTA and are acquiring new urgency within the Security and Prosperity Partnership of North America (SPP). This far-reaching plan for continental integration, forged by George W. Bush, Paul Martin and Vicente Fox in March 2005, contains over 300 provisions for the harmonization of national agricultural, security, immigration, environmental and aboriginal policies in all three countries.

Like TILMA, the process is being driven by big business lobby groups like the Canadian Council of Chief Executives. Their essential goal for the SPP is an erasing of the borders between Canada, Mexico and the U.S. in as many ways as possible. It's called “deep integration,” which is a good way to describe what TILMA does to the border between Alberta and B.C. So it is not surprising that business lobbies in Canada and the U.S. are showing a keen interest in the provincial agreement.

At the 2006 meeting of the Pacific Northwest Economic Region, a bi-national association of Canadian and American businesses with heavy involvement from the oil and gas sector, representatives from north-western U.S. states alongside B.C. and Alberta officials committed to explore the possibility of “expanding the TILMA concept throughout the PNWER region.” Then in 2007, a bi-national Trade and Economic Development Working Group recommended that PNWER ask the Workforce Mobility Task Force to “consider expanding their project's objectives to also include other TILMA issues such as procurement and standards/ regulations.”

The U.S. Trade Representative frequently complains about the Canadian Wheat Board and other agricultural policies. Entry to TILMA would give U.S. companies the legal means to dismantle or re-write them, and other provincial or municipal government rules they don't like.

“The TILMA dispute resolution is... everything Canadian business asked for.”

~ Hon. Gary Mar, Alberta MLA

Like these U.S. states, Finance Minister Jim Flaherty is enamoured with TILMA. “I encourage all provinces to sign on to this agreement, allowing us to break down these inter-provincial trade barriers and sharpen our competitive edge,” he told the Canada West Foundation on August 30, 2007. But there is more to this endorsement than simply ideological support.

The Security and Prosperity Partnership’s plan for North American regulatory convergence is made more difficult by the fact that the provinces have a lot of authority over rules affecting their economies. TILMA gives corporations the right to sue for compensation if they run into higher standards in other provinces, and so if all the provinces sign onto TILMA, it will make the job of harmonizing continental rules and regulations that much easier.

Unfortunately, a larger, national legal framework for TILMA, mixed with a plan for North American regulatory convergence, would give U.S. companies the same rights as Canadians to sue provincial and local governments, formalizing a process of integration that so far has no legal backing. Such an arrangement would require that Canadian and U.S. regulations on everything, including health care and the environment, be harmonized throughout the free-trade area, hastening a process of deep integration with the U.S. that Canadians have not had a chance to debate in public or in the House of Commons.

TILMA and local government

TILMA will not fully apply to existing local government policies until after a two-year transition period, but as of April 1, 2007, new government initiatives are vulnerable to lawsuits if a company or private individual feels they restrict or impair their trade or investment. Municipalities in B.C. and Alberta have been debating whether or not to demand that they be exempt entirely from the scope of TILMA, but provincial officials are making it clear that it’s not an option they favour.

Government “entities” covered under TILMA, and therefore vulnerable to private lawsuits, include regional, local, district or other forms of municipal government as well as school boards. A TILMA dispute resolution panel could rule that land use regulations violate the agreement by restricting real estate investments. Local government zoning bylaws to prevent urban sprawl, green space requirements for housing developments, and height restrictions on buildings are further examples of potential TILMA violations.

Local limits on billboard advertising, noise bylaws and pesticide restrictions could also be in jeopardy under TILMA, since these regulations restrict or impair investment. Even if TILMA’s list of legitimate government objectives were expanded to include such everyday goals of local governance, a TILMA panel would still have to be convinced that measures designed to achieve these objectives were the *least restrictive possible* – an almost impossible task when you think about it. Public education on the dangers of pesticides might cost the taxpayer more money, but it would certainly be less restrictive to corporate profits.

A further attack on local government authority comes in Article 12 of TILMA, which prohibits direct or indirect government subsidies like grants, tax waivers or other kinds of assistance if they “distort investment decisions.” Downtown revitalization plans and focused development programs are clearly intended to “distort investment decisions” by promoting investment in areas where it would otherwise not happen.

Make no mistake - TILMA is designed to give power to the corporate sector by taking it away from the public.

Similarly, TILMA imposes strict rules on how local government purchases are made for amounts as little as \$10,000. Ethical or local procurement policies—catering that uses only locally grown produce, for example—could be challenged under TILMA as unfairly restricting the investment of an out-of-town or out-of-province firm. To protect their authority, local governments need to obtain a complete exemption from TILMA like municipalities in B.C. are debating.

TILMA, public health and the environment

The Alberta-B.C. government guide to TILMA says that the agreement applies to “all government measures across all sectors,” and that if something is “not clearly identified as an exception, it is subject to the rules of the agreement.”

Proponents of TILMA will tell you that health and environmental policies are excluded from the agreement but this is not true. Governments and government agencies will be required to defend their public health policies as the *least restrictive means necessary* for achieving their goals. This puts the onus always on government to prove it is not impairing investment, even when its policies are designed to protect our health and environment.

Examples of the kinds of health care policies that could be challenged by private individuals or corporations include:

- Restrictions on the private, for-profit use of public health facilities, which could violate TILMA's prohibitions on regulations that restrict investment;
- Stricter rules at nursing care homes, which would violate TILMA's prohibitions on new regulations that restrict investment; and
- B.C.'s proposed ban on the sale of junk food in schools and hospitals, which could violate TILMA's prohibitions on maintaining regulations that are not the same as those in Alberta (Alberta has already rejected imposing such a ban).

Unlike NAFTA, TILMA does not exempt government programs and regulations with respect to health services. And on April 1, 2009, the inter-provincial agreement will be extended to cover hospitals and health authorities. Public health care, already under threat from private insurance companies and other for-profit interests, could suffer continuous attacks under TILMA's rules – attacks it might not be able to survive, and that could foster two-tier health care within the free-trade area.

Like with public health regulations, the environmental exceptions in TILMA are limited and vague, putting all kinds of policies designed to protect the Earth and our health into question. For instance, because they are not explicitly identified as exceptions, the following are just some of the environmental measures that could face TILMA-related lawsuits:

- Regulation of air pollution;
- Restrictions on tourism, recreation activities and development in ecologically sensitive areas; and
- Establishment of ecological reserves and green belts.

TILMA does contain exceptions for measures enacted in the areas of water (but not bottled water), energy and minerals, forestry, fish and wildlife, and the management and disposal of “hazardous and waste materials.” But all of these exceptions are to be reviewed annually to reduce their scope. Therefore, the agreement, over time, will pose an increasing threat to the right to regulate in the name of public health or the environment, even in these currently limited protected areas.

A national legal framework for TILMA would give U.S. companies the same rights to sue provincial and local governments as Canadian companies.

Make no mistake – TILMA is designed to give power to the corporate sector by taking it away from the public. TILMA has very forceful language designed to serve commercial interests. For example, whereas governments are committed to “eliminate barriers that restrict or impair trade, investment or labour mobility,” they are only asked to “promote sustainable and environmentally sound development.” “Promoting” renewable energy is a lot easier than “eliminating” greenhouse gasses.

Similarly, TILMA asks that governments “shall not establish new standards or regulations that operate to restrict or impair trade, investment or labour mobility.” But they “shall continue to work toward the enhancement of sustainable development, consumer and environmental protection.” When a TILMA dispute panel weighs these sometimes conflicting objectives, they are unlikely to conclude the environment should come out on top.

What can you do?

TILMA was not debated by either the Alberta or B.C. legislatures, and municipalities and other local governments weren't even consulted before it was signed. Cities and towns across B.C. and Alberta were forced to come to terms with TILMA only after it came into effect on April 1, 2007 and they realized just how much democratic control they stand to lose.

There is now a transition period of two years ending April 2009, after which local government measures that are amended or renewed will be covered by the terms of the agreement. However, Article 8 of TILMA allows exceptions to be added to the agreement “by mutual consent of the Parties.”

The B.C. and Alberta governments must be forced to negotiate a complete exception for local governments in Part 5 of TILMA, the section on General Exceptions. Several municipalities are already demanding this in official motions and in letters to the provincial government. They must be encouraged in their fight against this new corporate bill of rights. At the same time, that fight must be taken outside of western Canada.

Outside of Alberta and B.C. there is a lot of provincial interest in signing on to TILMA, particularly in Saskatchewan and Ontario but also in the Maritimes. The federal government has been pushing it too, and the alternate course of action that would enshrine a TILMA-like dispute resolution process into the Agreement on Internal Trade. These provinces must be discouraged from taking either path based on the dangers TILMA poses to local governance, public health, and deep integration with the U.S.

Citizens from across Canada must tell their local councillors and legislators to make fighting TILMA a priority at the municipal and provincial levels. Together we can stop TILMA. Our very health, environment, and our ability to create the kinds of communities we want to live in depend on it.

For more information about TILMA, and for ideas on how to fight it, contact the Council of Canadians at 1-800-387-7177 or visit www.canadians.org.